

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court of the United States for Puerto Rico (R. 23-26) is not officially reported. The opinion of the Circuit Court of Appeals, December 18, 1942, together with the separate opinion of PRESIDING JUDGE MAGRUDER, expressing a "doubt" on the *second phase* of the case (R. 46-50), appears in 132 F. (2d) 220-222 (*Advance Sheets*). The Order of the Circuit Court of Appeals, January 11, 1943, denying a rehearing (R. 51) has not yet appeared in the Federal Reporter.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered on December 18, 1942 (R. 50); and that Court entered its Order denying this petitioner's petition for rehearing on January 11, 1943 (R. 51).

Questions Presented

The questions presented are stated in the Petition ("Petitioner's Position" and "Questions Presented", *ante*, pp. 2-3).

Statutes Involved

The statutes primarily involved are in the Appendix, *infra*, pp. 31-37.

Statement

A statement of the case is in the Petition (*ante*, pp. 3-4), and a fuller statement is made hereafter (*infra*, pp. 10-15).

Specification of Errors To Be Urged

These are indicated under the headings "Petitioner's Position", "Questions Presented", and "Reasons for Granting the Writ" (*ante*, pp. 2-3 and pp. 7-8).

ARGUMENT

Statement

The summary statement of the case, made by the Circuit Court of Appeals, is in the petition (*ante,* pp. 3-4). Essentially the controversy is not between the insular government of Puerto Rico and the federal government, but between the insular government, this petitioner, The People of Puerto Rico, on the one hand, and the other respondent, the Casino de Puerto Rico, a private corporation, on the other hand.

Stating the facts a little more fully than was done by the Circuit Court of Appeals, the case originated as a condemnation proceeding by the United States Government in the federal District Court for Puerto Rico, to take over a parcel of land for Army purposes, "for recreation facilities to maintain the morale of the armed forces of the United States and of persons employed in national defense industries." (*Petition for Condemnation,* Par. 3; R. 2). The federal government deposited $125,000 to pay for the land.[9] The question is whether this deposit is sufficient to cover the value of the land, or is to be increased, and also whether it is to be paid to The People of Puerto Rico as the owner of the land, or to the Casino, or is to be divided between them. The District Court held that it should go to the Casino. (*Opinion,* R. 23-26; *"Decision and Judgment",* R. 26-29), and therefore that its stipulation accepting the $125,000 valuation was sufficient proof of value. The People of Puerto Rico believe it should go to them, or should be divided; and that the amount is too low; and accordingly appealed, and now bring this petition.

The questions turn on the construction of Joint Resolution No. 27 of the Legislature of Puerto Rico, approved April 20, 1936, particularly Section 3, including its three

---

[9] "Judgment", R. 11, 12. Motions for Judgment, etc., R. 13-14, 15-16. Stipulation between the federal government and the Casino de Puerto Rico, R. 17-19. Order for Delivery of Money, R. 20. Answer of People of Puerto Rico, R. 21-22. Opinion of the District Court, R. 23.

closing *Provisos,* taken in connection with the facts recited in the Preambles (Laws of Puerto Rico, 1936, pp. 1194-1198; Appendix, *infra,* pp. 34-37), together with the earlier Acts No. 69 of September 3, 1910, and No. 2 of February 21, 1912 (Laws of Puerto Rico, Extra Session, 1910, pp. 42-45; Laws of 1912, pp. 38-39; Appendix, *infra,* pp. 31-34), viewed in the light of the facts appearing in the record with relation to the history of the title, and the characteristics of the property with which the Legislature was dealing, forming the background of the legislation.

The *Provisos* are set out in the Petition (ante, p. 2).

As to the earlier history Judge Cooper finds (*Opinion,* (R. 23):

> "The land condemned originally formed a part of the public domain of the Spanish Crown and by the Treaty of Paris it was ceded to the United States. Subsequently the United States conveyed the said land to The People of Puerto Rico."

In 1913 The People of Puerto Rico granted, as a gift,[10] to the Casino de Puerto Rico a tract of land, including the parcel here in question,

> "for the purpose of cooperating in the construction and maintenance in the city of San Juan of a casino which may fill social needs and promote general culture."[11]

That grant was originally directed by Sections 7, 8, and 9 of Act No. 69 of September 3, 1910 (Appendix, *infra,* pp. 31-33), an act whose general purposes were to provide aid for the construction of buildings and institutions considered of special public value to the community. Section 2 directed a grant of land to the Young Men's Christian Asso-

---

[10] The deed expressed a nominal consideration of $1.00.

[11] Section 7, Act No. 69 of September 3, 1910; Laws of Puerto Rico, 1910, pp. 44-45; Appendix, *infra,* p. 32.

ciation for a Y. M. C. A. building;[12] and Sections 3, 4, 5, and 6[13] provided aid in the construction of an adequate hotel then much needed for the community,

> "which will be capable of suitably accommodating the needs and requirements of the tourist, commercial, transient and resident patronage" (Sec. 3).

Sections 7 and 8 of the Act of 1910 were amended by the Act of February 21, 1912 (Appendix, *infra*, pp. 33-34) so as (a) to require the Casino's building to cost not less than $60,000; (b) to allow a period of three years for its construction, instead of the year and a half originally allowed; and (c) to add the following further term to the *proviso* in Section 8:

> "*Provided*, That * * *, and that said building shall be maintained for the purposes of the association for a period of at least ten (10) years, and should this not be the case, the title of ownership of such land shall revert to The People of Puerto Rico." (Sec. 8; Appendix, *infra*, p. 34).

Section 9 of the original Act of 1910, never amended in this respect, and still in force, provides:

> "Section 9.—The terms, conditions and obligations of this Act shall apply to any purchaser or successor of such grantee, *whether by voluntary act or by judicial procedure.*" (*Italics supplied.* Appendix, *infra*, p. 33).

The building was constructed accordingly, and the Casino became one of the public institutions of the capital city of San Juan.

By 1936 the Casino had, however, become involved in financial difficulties, due primarily to the general depression of the times. It had mortgaged its properties to the Banco Territorial y Agrícola for $40,000, and was unable to pay

---

[12] Appendix, *infra*, pp. 31-32.
[13] Appendix, *infra*, p. 32.

out; only $4,000 had been paid on the past due mortgage, leaving a balance of $36,000 due. And the bank itself was in difficulties, and had pledged the Casino's mortgage notes, with other securities, to the Treasurer of Puerto Rico as collateral security upon the bank's own indebtedness to the Treasury.

It was of public interest to The People of Puerto Rico to keep the Casino's activities going, particularly the social center and the recreation park maintained on the portion of the property here in question. Under those circumstances, to help the Casino out, and to keep its activities going for the public benefit, a three-cornered deal was arranged, and was approved by the Legislature by Joint Resolution No. 27, *supra*, April 20, 1936, by which (1) the bank surrendered the Casino's $36,000 mortgage note outright to the Treasury, and received credit for its face value; and then (2) the Treasury turned around and bought one building, "the bowling alley building", from the Casino for this same sum of $36,000, the par value of the Casino's mortgage note thus held by the Treasury, and paid the purchase price by the cancellation of the note, so as to release the Casino from the indebtedness, and to put it on its feet financially. And The People of Puerto Rico, as a condition to thus disbursing that $36,000 out of its public Treasury to buy that bowling alley property, stipulated as a *third term* in the transaction that (3) in order to secure to The People in perpetuity the enjoyment of the "non-profit" portion of the properties, originally donoted to the Casino for those purposes by the Acts of 1910 and 1912, *supra*, the "social center and recreation park annexed thereto"[14] located on the portion of the property now involved in this condemnation proceeding, there should be included the emphatic stipulations appear-

[14] To secure the construction and maintenance of which in the first instance had been a cardinal inducement to the original donation of the land to the Casino by the Acts of September 3, 1910, and February 21, 1912 (Appendix, *infra*, pp. 31-34).

ing in the above quoted *Provisos* to Section 3 of the Joint Resolution (Appendix, *infra*, pp. 36-37).

The securing of such perpetual use of that property for the public therefore appears to have been a major part of the consideration for which The People of Puerto Rico paid the $36,000 out of their public funds, to acquire both (a) the bowling alley building, and (b) ***this perpetual use*** of this "non-profit" "social center and recreation park" for the citizens of Puerto Rico.

There is nothing in the Joint Resolution, or in its Preambles,[15] or in any other legislation, or elsewhere in this record, to indicate that the bowling alley building, simply taken by itself, would have been considered especially attractive or necessary as a purchase for office building purposes for The People of Puerto Rico, or for the expenditure of public funds, in 1936, during the depression times. It was the concomitant securing of the use of the "non-profit" portion of the property for the public, in perpetuity, that made the transaction attractive to the government. That thought was crystalized in the Preambles, and in the provisions of the Joint Resolution, particularly the *Provisos* in Section 3, *supra*.

The Casino, in reality, never had any valuable financial property interest in this particular parcel of this property, after accepting it back under this 1936 legislation; no interest from which it could ever derive any financial profit. It had received it originally as a part of a donation from The People under the Acts of 1910 and 1912 subject to the condition that it should be used for "social needs and promote general culture"; and in the transaction of 1936, when The People of Puerto Rico had to come to its financial rescue, the Casino had accepted further control of this particular parcel of land on specific conditions which, as expressed in

---

[15] Although the long 4th Preamble contains a concluding recital that "the Insular Government would acquire a building which would be of great use to it." (Appendix, *infra*, p. 35).

the *Provisos* in the Joint Resolution, bound it forever to use this parcel "*only for non-profit purposes,* as a social center and recreation park annexed thereto" (*Italics supplied*). In other words, the Casino never had any interest in the property of any financial,—or profit,—value whatever. **Its interest,—whatever the technical form of the title may be considered to have been,—was rather simply in the nature of a lease or license to use the property only for this non-profit purpose,**—a license automatically terminable, by its express terms, whenever from any cause whatsoever it should happen that either (1) "the Casino de Puerto Rico is dissolved", or (2) "its activities cease *in any way*"[16] (*Italics supplied*), or (3) "the said lot is used for other purposes different from those specified in the preceding provisos" [Second *proviso*, Sec. 3, Joint Resolution, Appendix, *infra*, pp. 36-37].

POINTS

First

On the *first phase* of the case, the question presented is, as indicated in the petition ("Questions Presented", *ante*, p. 3):

Were the conditions contained in the *second* and the *third Provisos* in Section 3 of the act, "Joint Resolution No. 27", of April 20, 1936,[17] under which the Casino accepted the land back from the insular government, broken by the United States taking the land in the condemnation proceeding?

And, if so, then did not the land *eo instanti* revert to, and become the property of, The People of Puerto Rico, and the deposited money which was substituted for the land by the

---

[16] That is to say, "in any way" *on this property*, with which the Legislature was specifically dealing, and the use of which it was the specific legislative intent to secure in perpetuity to The People of Puerto Rico for this "non-profit" purpose of "a social center and recreation park" for the general use of the public.

[17] *Ante*, Petition, p. 2; Appendix, *infra*, pp. 36-37.

condemnation proceeding therefore belong to The People of Puerto Rico?

Upon this first phase of the case the following points I to VII, inclusive, are submitted.

I

Was the condition broken by the United States taking the land?

(1)—If so, then, *eo instanti,* the land became the property of The People of Puerto Rico; and, hence,

(2)—The deposited money, substituted for the land, belongs to The People of Puerto Rico.

(3)—*The question is of the meaning and operation of the contract between the parties,* embodied in Joint Resolution No. 27 of 1936, with its *Provisos* in Section 3, in the light of the Preambles and the balance of the Act, and of the earlier Acts of 1910 and 1912, together with the legislative history of the title, and the physical characteristics of the property and its location and the purposes to which it had been devoted, all of which are to be considered in construing the language of the *Provisos.*

II

The determination of that question is not affected in any way by the fact that the transfer of title from the Casino to the Federal Government for the use of the Army was brought about by condemnation proceedings, rather than by voluntary sale. Condemnation is simply one form of transfer of title.

A.—The fact that the transfer was in the form of a taking by the federal government, in condemnation proceedings in eminent domain, does not affect this question.

B.—Such a taking is merely one form of transfer.

C.—No suggestion is found anywhere in the authorities,—either in text books or decisions,—that such a taking differs, in itself, from any other form of transfer, in its effect upon the preexisting contractual rights of the parties.

(1) If it did so differ in this respect, or if it did in itself change the pre-existing contractual rights of the parties *inter sese*, or operate differently in this respect from a voluntary transfer, then the very fact of such different operation or of changing the pre-existing mutual rights of the parties among themselves would, in itself, constitute a "taking" of property in the constitutional sense, and would require compensation to any party whose rights were thus adversely affected.

D.—The situation here is therefore the same as though the transfer had been by voluntary sale, instead of by condemnation,—as though the Casino and the United States had agreed upon a price, and made a voluntary sale and purchase.

E.—**The Casino could not change the situation,**—nor affect the rights of The People of Puerto Rico in any way,—**by simply refusing to agree with the United States on a price for a voluntary sale,** and thereby forcing the United States to condemn.

F.—The ultimate question here is, therefore:

What would have been the effect of a voluntary sale by the Casino to the United States, for the same purposes for which the land was taken in condemnation,

> "adequately to provide for recreational facilities to maintain the morale of the armed forces of the United States and of persons employed in national defense industries"?

(1)—Would that have been a breach of the conditions in the *Provisos?*

(2)—Would it have worked a reverter to The People of Puerto Rico?

(3)—The usual rules of interpretation of contracts and statutes are to be applied.

G.—Thus interpreting the Joint Resolution with its Preambles and *Provisos,* several elements seem plain:

(1)—**The underlying legislative intent was to secure to The People of Puerto Rico, in perpetuity, the use of this parcel of ground, "as a social center and recreation park"; and also,**

(2)—So far as the Casino was concerned, that it should be bound so to hold it, in perpetuity, without ever making any financial profit from it, or utilizing it in any way for purposes of financial gain,—"shall be used only for non-profit purposes".

(3)—That by the express terms of Section 9 of the earlier Act of September 3, 1910,[18] under which The People made the original donation to the Casino, still in force, and in the light of which, among other things, the *Provisos* in the Joint Resolution of 1936 are to be read, it was provided that,

> "Section 9.—The terms, conditions and obligations of this Act shall apply to any purchaser or successor of such grantee, *whether by voluntary act or by judicial procedure.*" (*Italics supplied*)

III

The wording of the *Provisos* is emphatic

It is made "a condition of this transaction", not only, on the one side of the medal, that this parcel of ground, "the remainder of the lot which was ceded to the Casino de Puerto Rico",

> "shall be used only for non-profit purposes, as a social center and recreation park",

but also, emphatically, on the other side of the medal,

> "That in case the Casino de Puerto Rico is dissolved, or its activities cease in any way, or the said lot is used for other purposes different from those specified in the preceding proviso, such act or acts shall determine the gratuitous reversion of said lot, as well as

[18] Appendix, *infra*, p. 33.

> of all improvements and works constructed thereon, to The People of Puerto Rico."

In view of this emphatic language, and in view of all the circumstances, it is believed plain that the transfer to the United States, for the Army, worked a breach of the condition, and hence a reverter to The People of Puerto Rico.

A.—To use the property for the Army,

> "for recreational facilities to maintain the morale of the armed forces of the United States and of persons employed in national defense industries" (R. 2),

is not the same thing as to use it for the inhabitants of Puerto Rico,—the people of the Island,—for which the Legislature had reserved it in perpetuity.

B.—It is not sufficient that a court may think,—as the District Court says, as above quoted (R. 25), that:

> "The People of Puerto Rico * * * will, now that this is to become a recreation center for the Army of the United States, receive probably a greater benefit by reason of its own citizens forming a part of that army."

C.—*That is not the same thing* for which the Legislature directed this land reserved in perpetuity.

D.—It is for the Legislature, and not for the courts, to say whether or not it is satisfactory to The People of Puerto Rico to use this land for this changed purpose, primarily for the benefit of the Army, instead of for the general public of the Island.

IV

Therefore, as above stated, the determination of the question is not affected in any way by the fact that the transfer of title from the Casino to the federal government for the use of the Army was brought about by condemnation pro-

ceedings, rather than by voluntary sale. Condemnation is simply one form of transfer of the title.[19]

Mayor etc. of New York vs. *City of New York,* 168 N. Y. 254; 61 N.E. 249. *In re Pier Old No. 11 East River,* 124 App. Div. (N. Y.) 465, 109 N. Y. Supp. 2, 3, 9-10; *affirmed, same case,* 102 N. Y. 539, 84 N.E. 1123. *Lancaster School District* v. *Lancaster County,* 295 Pa. 112, 144 Atl. 901, 903-904.

See also, applying the rule so as to work out different,—and apparently contradictory,—results in different cases, but illustrating the rule that the result is to be determined in accordance with the effect of the pre-existing contractual relation between the parties, whatever they may be, and that the operation of the contracts, deeds, or other instruments, is not changed by the mere fact that the transfer of the property is effected by condemnation proceedings rather than by voluntary deed: *Boteler* vs. *Phila. etc. Terminal R.R. Co.,* 164 Pa. 397, 30 Atl. 303; *Starck* v. *Mansfield,* 178 Mass. 76, 59 N.E. 643; *Chicago etc. R. Co.* v *Mechanics Institute,* 239 Ill. 197, 87 N.E. 933 (holding that: "A jury may, however, when the lease has many years to run, consider the reversion of no value").

Confer also *Nichols on Eminent Domain* (2nd Ed.), Vol. 1, Par. 119, pp. 341, 342; *Orgel on Eminent Domain,* p. 404.

It is true that, as Orgel notes (p. 404), in some of the cases the courts show a disposition to dodge the question and to hide behind the technical old conveyancing rules as to "condition subsequent", or "determinable fee", resulting sometimes in apparent injustice. But, particularly in the more recent cases in various State courts, the question has been squarely met, and the decision made in accordance

---

[19] But if the grantor or his heirs do not themselves ask that the reversion be given effect, no one else can do so. Their right is personal, and not assignable. This **distinction** is marked in some of the cases cited by the Circuit Court of Appeals, but was apparently overlooked by that court. *Confer, infra,* Point V, pp. 24-26.

with the terms of the pre-existing contractual relation between the parties,—whether set out in leases, deeds, contracts, or otherwise. If, in accordance with such pre-existing contractual relations, in whatever form, a transfer of the title or of the possession or use of the property,—whether effected by voluntary deed, or by condemnation proceedings, —operated *eo instanti* to end the right of possession, then in such cases effect has been given to that relationship, and the compensation directed paid over to the party who had thus become entitled to it as the owner of the land, after having given effect to that pre-existing relationship.

Thus, for example, as to lessees, Nichols says, in his work on Eminent Domain (Vol. I,—2nd Ed., *supra,*—p. 341),

> "It has become customary in drawing leases of valuable city property to insert a provision that upon the taking by eminent domain of a whole or a part of the premises leased, the term shall come to an end, and under such a lease the tenant has no estate or interest in the property remaining after the taking to sustain a claim for compensation."

A.—And so, with reference to a lease of a pier, the Appellate Division of the New York Supreme Court said (*In Re* Pier Old No. 11, East River, *supra,* 124 App. Div. 465; 109 N. Y. Supp. 2, 9-10):

> "Having due regard to the modification of their rights effected by the granting of a license or permit, different from the one contemplated, and which in legal effect became null and void upon the institution of condemnation proceedings, I am of opinion that the case should be deemed controlled by *Matter of Mayor, etc., of New York,* 168 N. Y. 254, 61 N. E. 249, where the lease contained a clause to the effect that it should cease and terminate in case the premises should be destroyed, or substantially changed by direction and authority of the department of docks or any other party having control of the wharves, piers, and waters of the city, and it was held that the lease was terminated by the condemnation proceedings, and that the tenant was

entitled to no award. The provision in that lease, as has been seen, was not express that it should terminate by the institution of a proceeding to take the land *in invitum*, and the court did not so hold. It held, however, that the tenant leased the property subject to its being taken for public purposes, which was contemplated by the parties, and that in legal effect, although the term was for a specified number of years, it was to cease and terminate whenever the city instituted proceedings to acquire the property."

B.—And so also, in the case of *Lancaster School District v. Lancaster County*, decided by the Supreme Court of Pennsylvania on January 7, 1929 (295 Pa. 112; 144 Atl. 901), the court said (144 Atl. at pp. 902-903, 903-904):

"FRAZER, J. Determination of this appeal involves legal disposition of $42,833, which the government of the United States paid for real estate within the city of Lancaster as a site for a post office building. The federal government instituted proceeding in 1916 in the District Court of the United States for the Eastern District of Pennsylvania to condemn the land; viewers appointed valued the property at $42,833, adjudged the title to be vested in the county of Lancaster, and upon entry of a decree by the court that sum was paid the commissioners of the county, who thereupon executed and delivered a deed to the government for the property. In 1926 the school district of Lancaster City, claiming to have had legal title to the land in question previous to and at the time of condemnation proceedings, instituted suit to recover the valuation fixed by the viewers. At the trial, both parties presented points for binding instructions, which the court reserved, and directed a verdict for defendant. Subsequently the court in banc, in a written opinion, refused to either enter judgment n. o. v. for plaintiff or grant a new trial. The school district appeals from that judgment. * * * [After reciting the early history of the title, prior to 1835]. * * *

"With the building erected, the new school district functioned, and nothing more was done with respect to acquiring title to the land in question until by the

Act of April 15, 1835, P. L. 289, the commissioners of Lancaster county were authorized to purchase the land from Kirkpatrick for the sum of $1,000, '*and to take a conveyance for the same and hold the same for the use of the directors of the first section of the second school district in the city of Lancaster aforesaid, so long as the building erected on said lot of ground shall be used by the said directors for the purposes of education, and when the same shall cease to be so used, the said lot of ground and buildings thereon erected, shall be vested in the commissioners of the county of Lancaster, for the use of said county.*' * * * (*Italics supplied*)

"Was the school district invested with a legal title to the land by the provisions of this instrument? The learned court below answers that question adversely, and our examination of the deed confirms that conclusion. It constitutes a grant of the land and buildings to the county commissioners and their successors in office, and passes the fee to the county, with merely a conditional estate in the school district. The county is to take and hold the land 'for the use of the directors, * * * so long as the building erected on said lot of ground shall be used by the said directors for the purposes of education.' Certainly, if the deed went no further than that, no condition would be raised. It would be a mere recital that the use was made for a particular purpose, consequently we concur in the observation of the court below that, while there was a definite and fixed time for the use, had there followed no agreement as to the disposal of the property after that time, the fee could be considered as vested in the school board and subject to its disposal, following *Sapper v. Mathers,* 286 Pa. 364, at page 366, 133 A. 565 (47 A.L.R. 1172), where we said: 'We have repeatedly held that a deed's limitation of the use to which the land conveyed might be put did not, without more, create a conditional fee or cause a forfeiture if put to another use,' and a grant declared to be for a special purpose, without other words, cannot be held to be a condition; to make the estate conditional the instrument must clearly show such intent. *First Methodist Episcopal Church of Columbia v. Old Columbia Public Ground Co.,* 103 Pa., 608, 614; *Cook v. Trimble,* 9 Watts, 15.

"[3, 4] We are met with no such difficulty in the

case before us. *Here in so many words there are both a plain and direct limitation of the fee and a forfeiture or termination of the estate in case the premises cease to be used for the purposes of education,* 'and when the same shall cease to be so used, the said lot of ground and buildings thereon erected shall be vested in the commissioners of the county of Lancaster, for the use of the said county.' These words create a conditional estate, depending, not upon the use of the ground for educational purposes, but upon the use of the building thereon for such purposes. The use ceased, the limitation was reached, when the federal government in 1917 took over the property for its own purposes. The condition of reverter in the deed is definite, and the words connect the condition with the grant, qualifying and restraining the use of the premises for a definite time and a sole purpose. *Cook* v. *Trimble, supra.* It follows, then, that the present school district of the city of Lancaster, as the legal successor of the original board, was vested with the same contingent right in the property, and cannot claim a more extended estate than that possessed by its predecessor. At the time the conditional estate was dissolved by the cessation of the use of the building for school purposes, the county took the property in fee, and consequently became entitled to the purchase money paid by the United States." (*Italics supplied.*)

V

But only the grantor, or his heirs, can take the benefit of the reversion, upon such breach of condition.

No one else can. The right is not assignable.

A. Thus, in one of the cases cited in the opinion of the Circuit Court of Appeals (R. 49), it was said (*United States* v. *2,086 acres of land,* 46 Fed. Supp. 411, 412, 413):

"* * *. The heirs at law of the grantor have made no claim to the condemnation award or any part thereof in response to an order of this Court requiring them to assert any claim that they may have thereto. (*At p. 412*) * * *.

"* * *. Where an estate has been granted upon a

> condition subsequent, no one but the grantor or his heirs can take advantage of the breach of such condition. The deed is not void on breach of the condition, but becomes so only when the grantor or his heirs enter; or, if actual entry is impossible, by the grantor or his heirs setting up claim to the property. * * *. (*At p. 413*).

And that was apparently the real *ratio decidendi* in some of the other recent cases relied on by the Circuit Court of Appeals, such as *First Reformed Dutch Church* v. *Crosswell, supra,* 210 App. Div. 294, 206, N. Y. Supp. 132, 133-134.

B. The situation here is the EXACT CONTRARY to that in the *2,086 acres of land* case.

Here, the grantor, The People of Puerto Rico, is asking enforcement, for the benefit of the citizens of the Island, of the condition upon which it had granted the license for the use of this property to the Casino, but had granted it only upon conditions emphatically designed to retain for the public in perpetuity the right to the active use of the property at all times *"as a social center and recreation park"*, to be held by the Casino, from the latter's standpoint, *"only for non-profit purposes"*.

In other words, the Casino in reality held the property *only as a trustee, under an active trust,* for the benefit of The People of Puerto Rico as *cestui que trust* for the use of the public.

C. *This is a very different situation* from that presented, for example, in those church cases where (1) the grantor had many years previously given land for a church building, reserving no active interest or use in the property whatsoever, but only stipulating for reversion in case the land ceased to be used for church purposes; and where (2) upon condemnation by the United States neither the grantor nor his heirs appeared or asked the benefit of the reversion [and the courts held that no one else could do so].

D. *The Circuit Court of Appeals apparently overlooked this distinction* when, in citing these cases, it said (Opinion, R. 49) that they "are all *squarely in point*" (*Italics supplied*).

E. Despite the rather technical reasoning about conveyancing questions of a "base or determinable fee" or of a "condition subsequent" in the opinion in the ***First Reformed Dutch Church*** case, *supra,* and in some of the others, it appears that, in the end, quite without exception, at least in the later cases, the courts have in fact endeavored to arrive at substantial justice, under varying circumstances of the different particular cases. *And the common law conveyancing system is not in force in Puerto Rico.*

F. *Manifestly, that means, in the present case,* that *the rule of the Pennsylvania court* in the *Lancaster School District* case above quoted (*ante,* pp. 22-24) *should be applied;* and that the plain intent of the Legislature of Puerto Rico should be made effective, that when what amounted to this *license* to the Casino to use the property granted to it by the Legislature, without other compensation, solely for "non-profit purposes", "as a social center and recreation park" for the people of Puerto Rico, was terminated, in whatever manner, thereupon all interests and rights of the Casino in the land were automatically at an end,—which means that the proceeds should go to the People. To give the proceeds, under such circumstances, wholly to the Casino, would mean simply to give it the benefit of an unconscionable profit, out of the People's property.

VI

It is immaterial that at the time of the enactment of the Joint Resolution in 1936 and the consummation of the transaction under it,—or at the times of the enactments of the earlier Acts of 1910 and 1912, and of the acts done under them,—the thought of the taking over of this parcel of land for the Army, by the federal government by condemnation

proceedings, may not have actually been actively in the minds of the members of the Legislature.[20]

The usual rule applies here, with relation to the construction of contracts and statutes. Impossibility of performance, the supervening of "an act of God", or other contingency not provided against in an absolute, positive, covenant in a contract or deed, or in any statutory provision, is no excuse for non-performance, no release from the provisions or conditions of the contract or deed. In the absence of proof of error or mistake, or of misunderstanding, it is to be presumed that the parties intended an absolute contractual provision to be absolute, to mean what it says.

VII

There is nothing here to indicate any mistake either of law or fact, or any misunderstanding, either on the part of the Legislature in stipulating the conditions set out in the *Provisos* in the Joint Resolution of 1936, or on the part of the Casino in accepting them.

The plain intent of the Legislature was to secure to the Puerto Rican public the use, in perpetuity, in any event, of this "social center and recreation park".

The legislation was so framed as, emphatically, to effectuate that legislative intent. The terms were accepted by the Casino, and the $36,000 was accordingly paid to it by the insular government on the express conditions, binding it to hold this parcel of land solely on a "non-profit" basis, giving it no valuable financial interest in it whatever, with all its interest automatically terminable instantly

---

[20] Although there is nothing to show that the possibility of condemnation for some purpose at some time was outside of the contemplation of the parties,—either of the Legislature or the Casino. In fact Section 9 of the Act of 1910 (Appendix, *infra*, p. 33) expressly indicates that the possibility of transfer "by judicial procedure" was in the legislative mind at that time.

upon any change in the use to which the land was put, or other breach of the conditions stated in the *Provisos.*

A.—*That legislative intent necessarily excludes the idea that any change would have been made in the terms of the "Provisos," in case the possibility of the property being taken over by the federal government for the Army, either by voluntary purchase or by condemnation proceedings, had been suggested to the legislators at that time.*

To the contrary, it is very plain that any such suggestion would have run directly counter to the idea of carrying out the legislative purpose to secure this property in perpetuity for the use of the Puerto Rican public; and hence would certainly not have caused any change in the conditions as stated in the *Provisos,*—but rather, if anything, to the exact contrary, would have caused a strengthening, if possible in any way, in the ironclad quality of the phaseology of the *Provisos.*

Second

On the *second phase* of the case the question presented is, as indicated in the petition ("Petitioner's Position" and "Questions Presented", *ante,* pp. 2-3):

Whether, under the *first Proviso* of Section 3 of the "Joint Resolution" of 1936 *ante,* p. 2; Appendix, *infra,* p. 36):

> **"Provided, That as a condition of this transaction, the remainder of the lot which was ceded to the Casino de Puerto Rico *shall be used only for non-profit purposes, as a social center and recreation park annexed thereto" (Italics supplied).**

the People of Puerto Rico did not, during the time while the Casino was in possession, and before these condemnation proceedings were ever begun,—and independently of any question whatever of reversion under the second and third *Provisos,*—have a then presently existing active possessory interest in the property, in the nature of an active trust for its benefit, capable of being valued like any other presently

existing undivided interest in property, and therefore compensable in these condemnation proceedings.

VIII

The primary legislative intent permanently to secure the unrestricted free use of this property for the citizens of Puerto Rico "as a social center and recreation park annexed thereto" has already been indicated (*ante*, Statement" pp. 13-15, and Points II-G, III, and VII, pp. 18-19, 27-28).

This was the primary purpose moving the Legislature to disburse the $36,000.00 out of its public Treasury by this legislation during the depression period, in 1936 ("Statement", *ante*, pp. 13-14).

IX

Wholly regardless of any question of reversion under the first phase of this case, or under the second or third *Provisos* in the legislation, this presently existing undivided active right and interest of The People of Puerto Rico in this property, was taken by the federal government by the condemnation proceedings.

A. There was nothing contingent or uncertain about that interest. It was a valuable, presently existing, right. It was capable of valuation like any other undivided interest. It was therefore compensable in these proceedings.

X

In view of that interest, the District Court should not have accepted the stipulation, signed only by the Casino with the federal government, as to the value of its interest in the property being only $125,000.00 (R. 17-19) as the adequate or sufficient basis (*Motion or Entry of Judgment*, and *Order for Delivery of Money;* R. 15-16, 20) for determining the value of the land; but should have heard evidence upon this petitioner's "Answer" (R. 21-22) as to the actual value of the land, and of all of the undivided interests in it, including the value of this interest of The People of Puerto

Rico in having this property thus maintained in perpetuity, as it then stood, under this first *Proviso* of the legislation of 1936, "as a social center and recreation park" for its citizens.

XI

It follows that Judge Magruder's "doubt", in his separate opinion (R. 50), should be considered as indicating the correct answer to the question on this second phase of this case.

This interest of The People of Puerto Rico is capable of being valued by the District Court; *and should be.*

Conclusion

The judgment of the District Court affirmed by the Circuit Court of Appeals, overruling the contentions of this petitioner, The People of Puerto Rico, on both phases of its position here, was wrong. Certiorari should issue; and, upon argument, the judgments below should be reversed, and the case be remanded to the District Court for further proceedings, with directions to determine the true and entire valuation of the land, and of the interest of this petitioner in it.

Respectfully submitted,

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

MANUEL RODRIGUEZ RAMOS,
Acting Attorney General of Puerto Rico,
Of Counsel.